OCT 2 9 1993

No. 93-576

In The

Supreme Court of the United States

October Term, 1993

ROY T. RIMMER, JR.,

Petitioner,

v.

OCTAGON GAS SYSTEMS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. FRENCH
Counsel of Record
MICHAEL L. CHEEVER
FAEGRE & BENSON
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-
(612) 336-3802

THOMAS J. MOORE
CHARLOTTE C. WIESSNER
ADRIENNE O. MCNAMARA
FAEGRE & BENSON
2500 Republic Plaza
370 – 17th Street
Denver, Colorado 80202
(303) 592-5900

Attorneys for Respondent Octagon Gas Systems, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Under Oklahoma law, does the seller of an account retain an equitable interest in the account when the purchaser does not properly perfect his purchase by filing a financing statement as required by Oklahoma law?

RULE 29.1 NOTATION

The Respondent, Octagon Gas Systems, Inc., was a subsidiary of Octagon Resources, Inc., at the time this action was commenced. The two corporations have since been merged with Octagon Resources, Inc., being the surviving corporation. Octagon Resources, Inc. has no parent corporation or subsidiary corporations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.1 NOTATION ii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE TENTH CIRCUIT'S INTERPRETATION OF OKLAHOMA LAW 6

A. The Tenth Circuit Properly Looked to Oklahoma Law and Correctly Determined that Oklahoma Law Gave Poll an Equitable Interest in the Accounts 7

B. The Tenth Circuit Decision Is Not in Conflict with the Holding of the Eighth Circuit in *Garrott & Sons* 9

II. RIMMER'S PETITION IS PREMATURE 10

A. Rimmer Wants This Court To Review a Case that the Tenth Circuit Did Not Decide 10

B. Rimmer Waived Any Right To Contest the Transfer to Octagon 13

III. THE TENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *DEWHIRST V. CITIBANK* 14

TABLE OF CONTENTS – Continued

Page

CONCLUSION 15

APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Bishop v. Wood, 426 U.S. 341 (1976) 7

Butner v. United States, 440 U.S. 48 (1979) 6, 8, 10

Daly v. Shrimplin, 610 P.2d 397 (Wyo. 1980) 9

Dewhirst v. Citibank (In re Contractors Equip. Supply Co.), 861 F.2d 241 (9th Cir. 1988) 6, 14, 15

Garrott & Sons v. Union Planters Nat'l Bank (In re N.S. Garrott & Sons), 772 F.2d 462 (8th Cir. 1985) 6, 9, 10

In re Flowers, 78 B.R. 774 (Bankr. D.S.C. 1986) 9

Major's Furniture Mart, Inc. v. Castle Credit Corp., 602 F.2d 538 (3d Cir. 1979) 9

Planned Parenthood v. Casey, ___ U.S. ___, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) 6

Stoll v. Gottlieb, 305 U.S. 165 (1938) 13

United States v. Trigg, 465 F.2d 1264 (8th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) 9

United States v. Whiting Pools, Inc., 462 U.S. 198 (1983) 7, 9, 11

STATUTES

11 U.S.C. § 541 ..... 2, 5, 7, 9

28 U.S.C. § 1254(1) 2

Okla. Stat. Ann. tit. 12A, § 1-201(37) 2

Okla. Stat. Ann. tit. 12A, § 9-102(1)(b) 2, 4, 8

Okla. Stat. Ann. tit. 12A, § 9-106 2

TABLE OF AUTHORITIES – Continued

Page

Okla. Stat. Ann. tit. 12A, § 9-301(1)(b) and (3) .. 2, 3, 8

Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).... 2, 3, 5, 8, 11, 12

ARTICLES

Schwarcz, *'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Backed Finance*, 210 N.Y.L.J., No. 24 (August 4, 1993)..... 11

No. 93-576

In The

Supreme Court of the United States

October Term, 1993

ROY T. RIMMER, JR.,

Petitioner,

v.

OCTAGON GAS SYSTEMS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Octagon Gas Systems, Inc., submits this brief in opposition to Petitioner's request that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

The Court of Appeals issued its order reversing the District Court and remanding for further proceedings on May 27, 1993. Pet. App. 17a. The Court of Appeals denied a petition for rehearing on July 8, 1993. Pet. App. 35a. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Contrary to the assertion of Petitioner, the decision in this case does not turn upon the construction of any federal constitutional or statutory provisions. The Tenth Circuit did not use § 541 of the United States Bankruptcy Code, 11 U.S.C. § 541, to include in the debtor's bankruptcy estate an equitable interest which did not exist under state law at the time the bankruptcy petition was filed. Rather, it held that the debtor had such an interest under Oklahoma Statutes Annotated title 12A, §§ 1-201(37), 9-102(1)(b), 9-106, 9-301(1)(b) and (3), and 9-302(1)(e). Because of the length of these provisions, they are set out in the Appendix to this Brief.

STATEMENT OF THE CASE

Prior to October, 1988, Petitioner Roy T. Rimmer, Jr. ("Rimmer") acquired the right to receive five percent of all amounts paid to Poll Gas, Inc. ("Poll") under certain contracts pursuant to which Poll sold natural gas and gas liquids. Under Article 9 of the Oklahoma Commercial Code, the interest which Rimmer acquired from Poll is an "account." Okla. Stat. Ann. tit. 12A, § 9-106.

Pursuant to Okla. Stat. Ann. tit. 12A, §§ 1-201(37), 9-102(1)(b) and 9-302(1), the purchaser of an "account" is treated as having a security interest in the account and

must file a financing statement to "perfect" his purchase regardless of whether the purchase is intended as a true sale or merely as security. The *only* exception to the Oklahoma filing requirement is that no filing is required if the purchased accounts are not a significant part of the seller's total accounts. Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).

Rimmer never filed the financing statement required by Oklahoma law to perfect his purchase of Poll's accounts. Okla. Stat. Ann. tit. 12A, §§ 9-301(1)(b) and (3) expressly provide that the interest of a purchaser of accounts, such as Rimmer, who fails to file a financing statement to perfect his purchase is subordinate to the interests of a lien creditor, including specifically a trustee in bankruptcy.

In October, 1988, Poll filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. In January, 1990, Poll confirmed a plan of reorganization which provided for the transfer of the accounts in which Rimmer claims an interest to Respondent Octagon Gas Systems, Inc. ("Octagon").[1] The plan expressly provided that the transfer was to be "free and clear of all liens, claims, interests and encumbrances." Pet. App. 3a. Rimmer did not object to the transfer of the accounts free and clear of his interest, did not appeal the order confirming Poll's plan, and, in fact, voted to accept the plan.

---

[1] Following the commencement of this case, Octagon Gas Systems, Inc., was merged into Octagon Resources, Inc., with Octagon Resources, Inc., being the surviving corporation.

In January, 1991, almost a year after the order confirming the Poll plan had become final and non-appealable, Rimmer argued for the first time that the plan did not effectively convey the interest he claimed in the Poll accounts to Octagon. On cross-motions for summary judgment, the Bankruptcy Court held that the interest Rimmer claimed in Poll's accounts had not been transferred to Rimmer for security and, therefore, Article 9 of the Oklahoma Commercial Code was inapplicable.[2] Because the Bankruptcy Court held that Article 9 was inapplicable, it concluded that Rimmer's "interest" in Poll's accounts was not an asset of Poll's bankruptcy estate and could not be transferred to Octagon as part of Poll's plan. The District Court affirmed the Bankruptcy Court.

Relying on the plain language of Okla. Stat. Ann. tit. 12A, § 9-102(1)(b) and the official comment to that section, the Tenth Circuit correctly found that, under Oklahoma law, all sales of accounts were covered by Article 9 of the Oklahoma Commercial Code regardless of whether the transfer was a true sale or was intended only for security. The Tenth Circuit reversed the judgment in favor of Rimmer and remanded the case to the Bankruptcy Court to determine the effect that application of Article 9

---

[2] The Bankruptcy Court erroneously analyzed the case under Article 2 of the Oklahoma Commercial Code which governs sales of "goods." In his brief to the Tenth Circuit, however, Rimmer acknowledged that his interest was an account. *See* Pet. App. 8a. Accordingly, Article 2 of the Oklahoma Commercial Code was not applicable.

would have on the Bankruptcy Court's decision, specifically requesting that the Bankruptcy Court determine whether Rimmer was required to "perfect" his interest by filing a financing statement and whether he did so.[3] Pet. App. 17a. The Tenth Circuit also directed the Bankruptcy Court to determine whether, by voting for Poll's plan of reorganization and failing to appeal the order confirming Poll's plan, Rimmer waived any right he might have had to assert that his interest in Poll's accounts was not transferred to Octagon by the plan. Pet. App. 17a.

SUMMARY OF ARGUMENT

This case does not involve an interpretation of § 541(a)(1) and (d) of the Bankruptcy Code whereby an equitable interest which Poll did not have at the commencement of its bankruptcy case was included in its bankruptcy estate. Rather, the Tenth Circuit held that Poll had an equitable interest in the accounts under state law and, therefore, § 541 required the interest to be included in Poll's bankruptcy estate.

The decision of the Tenth Circuit was based solely on its interpretation of Oklahoma law, and there is no reason for this Court to exercise its discretionary jurisdiction to review the Tenth Circuit's interpretation of that law. Even

---

[3] Rimmer has never asserted that he filed a financing statement to perfect his purchase. Therefore, the only issue on remand is whether Rimmer was excused from perfecting his interest in Poll's accounts by the *de minimis* exception to the filing requirement set out in Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).

if this Court were otherwise inclined to exercise its jurisdiction, review is premature because the Tenth Circuit has remanded the case to the bankruptcy court to make findings which are necessary to determine the proper application of Oklahoma law.

Contrary to Rimmer's arguments, the decisions of the Eight Circuit in *Garrott & Sons v. Union Planters National Bank (In re N.S. Garrott & Sons)*, 772 F.2d 462 (8th Cir. 1985), and the Ninth Circuit in *Dewhirst v. Citibank (In re Contractors Equipment Supply Co.)*, 861 F.2d 241 (9th Cir. 1988), are not in conflict with the decision of the Tenth Circuit in this case. But even if the courts had reached different conclusions – which they did not – no conflict between the circuits would exist because each court interpreted a different state's law. No conflict between the circuits exists when the allegedly conflicting decisions are based on the laws of different states.

ARGUMENT

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE TENTH CIRCUIT'S INTERPRETATION OF OKLAHOMA LAW.

Rimmer's petition for certiorari should be denied because the only issue raised by the petition is whether the Tenth Circuit correctly interpreted Oklahoma law. This Court has repeatedly held that it will not grant certiorari to review a lower federal court's interpretation of state law. *See, e.g., Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2822, 120 L. Ed. 2d 674 (1992); *Butner*

v. United States, 440 U.S. 48, 57-58 (1979); *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976).

As the basis for requesting Supreme Court review, Rimmer argues that the Tenth Circuit's decision violates § 541(d) of the Bankruptcy Code by including in Poll's bankruptcy estate an equitable interest in the accounts purchased by Rimmer which Rimmer asserts did not exist when Poll filed its bankruptcy petition. But in holding that Poll's bankruptcy estate included an equitable interest in those accounts, the Tenth Circuit merely held that the interest existed under Oklahoma law at the time of Poll's bankruptcy. Therefore, the Tenth Circuit did not include an interest in Poll's bankruptcy estate which Poll did not already possess under state law. Regardless of whether the Tenth Circuit correctly interpreted Oklahoma law, the Tenth Circuit's interpretation of that law is not an appropriate subject for review by this Court.

A. The Tenth Circuit Properly Looked to Oklahoma Law and Correctly Determined that Oklahoma Law Gave Poll an Equitable Interest in the Accounts.

Section 541(a)(1) of the Bankruptcy Code expansively defines the property of a debtor's estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." In *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983), this Court held that § 541 of the Bankruptcy Code was not intended to limit the property interests which were included in a debtor's bankruptcy estate, and held that the debtor's bankruptcy estate included all property interests which

the debtor had under state law. Therefore, a bankruptcy court must look to state law to determine whether a debtor has a legal or equitable interest in any particular property at the commencement of the bankruptcy case. *See Butner v. United States*, 440 U.S. at 54-55. If it finds that the debtor has an interest under state law, that interest is automatically included in the debtor's estate.

When the Tenth Circuit considered whether Poll had an interest in the accounts purportedly purchased by Rimmer, it rightly looked to Oklahoma law as being dispositive of the nature and extent of Poll's interest. Section 9-102(1)(b) of the Oklahoma Commercial Code, as evidenced by the official comments accompanying that section, makes Article 9 of the Code expressly applicable to a sale of accounts even where the sale was a "true" sale and was not intended as a security device. The Tenth Circuit therefore held that the Bankruptcy Court had wrongly concluded that Article 9 applied only to grants of security.

Applying Article 9, the Tenth Circuit held that, even in the case of a true sale, Okla. Stat. Ann. tit. 12A, § 9-301(1)(b) gives a seller of an account an equitable interest in the account when the purchaser of the account fails to perfect its interest as required by Article 9. Because it was not clear from the record whether Rimmer was required to perfect his interest in Poll's accounts by filing a financing statement, the Tenth Circuit remanded the case to the Bankruptcy Court to determine whether Rimmer had not acquired a significant part of Poll's accounts and therefore was excused from filing by Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).

The Tenth Circuit's analysis is undeniably correct. Its holding that Article 9 of the Oklahoma Commercial Code applies to true sales of accounts and that the seller retains an equitable interest in the sold accounts if the purchaser does not properly perfect his purchase is in accord with the decisions of other courts which have considered the issue under the similar law of other states. *See Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 542 (3d Cir. 1979) (applying Pennsylvania law); *United States v. Trigg*, 465 F.2d 1264, 1268-69 (8th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) (applying Arkansas law); *In re Flowers*, 78 B.R. 774, 776 (Bankr. D.S.C. 1986) (applying South Carolina law); *Daly v. Shrimplin*, 610 P.2d 397, 400-01 (Wyo. 1980) (applying Wyoming law).

Under § 541 of the Bankruptcy Code and this Court's holding in *Whiting Pools, supra*, it is not up to the federal courts to exclude property interests which exist under state law from a debtor's bankruptcy estate. If Oklahoma statutory law creates interests which have an adverse impact in other areas, it is up to the Oklahoma legislature, not the federal courts, to decide whether Oklahoma law should be changed.

B. The Tenth Circuit Decision Is Not in Conflict with the Holding of the Eighth Circuit in *Garrott & Sons.*

Rimmer argues that the Tenth Circuit's decision conflicts with the holding of the Eighth Circuit in *Garrott & Sons v. Union Planters National Bank (In re N.S. Garrott & Sons)*, 772 F.2d 462 (8th Cir. 1985), on the issue of whether § 541(a)(1) and (d) of the Bankruptcy Code allows an

equitable interest in property to be included in the bankruptcy estate if the debtor did not own the interest at the time the bankruptcy petition was filed. Rimmer's argument overlooks the essential holding of both the Tenth Circuit and the Eighth Circuit that state law determines whether an equitable interest exists at the time the debtor files its bankruptcy petition.

Relying in part on *Butner v. United States, supra,* the Eighth Circuit held that the question of whether a debtor retained an interest in an escrow account was determined by the state law of Arkansas and held that, because Arkansas law required the imposition of a constructive trust on the escrow account, only that portion of the escrow account which was not required to satisfy the constructive trust constituted property of the estate. *Garrott & Sons,* 772 F.2d at 467. This holding is not in conflict with the holding of the Tenth Circuit at all. In both cases, the courts carefully looked to state law to determine the nature and extent of the debtor's interest in the property in question and held that the debtor's bankruptcy estate included whatever equitable interests existed under state law.

II. RIMMER'S PETITION IS PREMATURE.

A. Rimmer Wants This Court To Review a Case that the Tenth Circuit Did Not Decide.

Rimmer does not seriously dispute that Article 9 of the Oklahoma Commercial Code is applicable to true sales of accounts, or that his unperfected interest in Poll's accounts would be subordinate to the interest of Poll's bankruptcy estate if he was required by the Oklahoma

Commercial Code to perfect his interest by filing a financing statement. Rather, Rimmer's real concern is that, because Article 9 of the Oklahoma Commercial Code classifies the interest of a purchaser of accounts as a "security interest," and because this Court held in *Whiting Pools, supra,* that property subject to a security interest is included in a debtor's bankruptcy estate, the Tenth Circuit might hold that Poll had an equitable interest in the accounts acquired by Rimmer even if he was excused from perfecting his purchase by the § 9-302(1)(e) *de minimis* exception.[4] This issue was not decided by the Tenth Circuit and is not before this Court.

The Tenth Circuit did not hold that an account sold by a debtor prior to bankruptcy is always property of the

---

[4] This is also the concern of the asset-backed financing industry which Rimmer uses in an attempt to give the Tenth Circuit decision an aura of national importance. In his article cited in Rimmer's petition, Professor Schwarcz acknowledges that the asset-backed financing industry understands that Article 9 of the Uniform Commercial Code applies to true sales of accounts and requires the purchaser to perfect its purchase by filing a financing statement. Schwarcz, *'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Backed Finance,* 210 N.Y.L.J., No. 24 (August 4, 1993). Rather, Schwarcz and the other commentators cited by Rimmer are concerned that the characterization of the interest of a purchaser of accounts under the Uniform Commercial Code as a "security interest" may mean that accounts sold to a properly perfected purchaser are still part of the seller's bankruptcy estate. As noted in the text following this footnote, the Tenth Circuit did not hold that accounts sold to a properly perfected purchaser are nonetheless part of the seller's bankruptcy estate. Even if it had so held based on Oklahoma law, it would not be within the province of the federal courts to revise Oklahoma law to remove perceived impediments to asset-backed financing.

seller's bankruptcy estate. In fact, in response to the claim by the dissent in the case that the majority's holding had just that effect, the Court explained:

> The dissent implies that the application of Article 9 to the facts of this case automatically divests Rimmer of his interest. We do not agree that such a result is mandated. For example, upon remand, the court may determine that Rimmer retains his interest because no U.C.C. filing was required under Okla. Stat. Ann. tit. 12A, [§ 9-302(1)(e)] (no filing required if account assignment does not transfer a significant part of outstanding accounts of assignor).

Pet. App. 17a n.10.

Far from holding that accounts sold to a perfected purchaser are nonetheless part of the seller's bankruptcy estate, the Tenth Circuit remanded the case to the bankruptcy court to determine whether Rimmer was required to perfect his purchase by filing a financing statement and if he was required to file a financing statement, whether he did so.[5] That remand would have served no purpose if the accounts were part of Poll's estate in any event.

Because the issue of whether accounts sold to a perfected purchaser are property of the seller's bankruptcy estate was not decided by the Tenth Circuit, review by this Court is both premature and inappropriate. At a minimum, this Court should wait until the bankruptcy

---

[5] Although the Tenth Circuit did not find the record on whether Rimmer filed a financing statement clear, Rimmer has never asserted that he filed one.

court determines whether Rimmer was required to perfect his purchase under Oklahoma law. If Rimmer was required to perfect, his interest is unquestionably subordinate to the interest of Poll's bankruptcy estate and there will be nothing for this Court to review.

B. Rimmer Waived Any Right To Contest the Transfer to Octagon.

The Tenth Circuit also remanded this case to the Bankruptcy Court to determine whether Rimmer is estopped from asserting his claim to the property at issue in this case. Pet. App. 17a. The Poll plan of reorganization expressly provided for the transfer of the accounts claimed by Rimmer to Octagon "free and clear of all liens, claims, interests and encumbrances." Pet. App. 3a. Rimmer voted to accept this plan and did not appeal the order confirming it.

In *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), this Court held that the only way a party in interest could preserve its claim that a plan of reorganization contained terms which were contrary to law was to object to confirmation and appeal the confirmation order. The Bankruptcy Court must now decide whether Rimmer may collaterally attack the order confirming a plan to which he not only failed to object but which he actually voted to accept. This Court should therefore not reach the issues in this case until after the Bankruptcy Court acts upon remand.

III. THE TENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *DEWHIRST V. CITIBANK*.

Contrary to Rimmer's contention, a mature conflict between the circuits does not exist. To the extent that the Tenth Circuit's decision in this case and the Ninth Circuit's decision in *Dewhirst v. Citibank (In re Contractors Equipment Supply Co.)*, 861 F.2d 241 (9th Cir. 1988), address the same issues, the two decisions are in accord. The Ninth Circuit recognized that Article 9 of the Arizona Commercial Code, like Article 9 of the Oklahoma Commercial Code, applies to sales of accounts which are not intended for security. *Id.* at 245.

Although the two courts agree as to the applicability of Article 9 in each state to true sales of accounts, the issues before the Courts were otherwise entirely different. The issue decided by the Tenth Circuit was whether, under Oklahoma law, accounts sold prepetition were part of the seller's bankruptcy estate when the purchaser failed to perfect. The issue presented in *Dewhirst* was whether, by directing an account debtor to make payment directly to it, the holder of a security interest in an account so completed its foreclosure of its security interest in the account as to terminate the debtor's equitable interest in the account under Arizona law. The Ninth Circuit held that, under the facts of the case before it, the notice to the account debtor did not transfer title to the account to the secured party, and therefore, the account was still property of the debtor's estate. *Id.*

No conflict between circuits would exist even if the courts had considered the same legal issue. The Ninth

Circuit's decision was based wholly on its interpretation of Arizona statutory law. The Tenth Circuit's decision in this case was based wholly on its interpretation of Oklahoma statutory law. A conflict between the circuits does not exist if the allegedly conflicting decisions deal with different provisions of law or with similar provisions of the law of different states.

A threshold requirement for the existence of a conflict between circuits is that the circuits address the same issue and render inconsistent decisions. Because the issue addressed by the Ninth Circuit in *Dewhirst* is entirely different than the issue addressed by the Tenth Circuit in this case and because the two courts applied the law of different states, no conflict between the circuits exists.

CONCLUSION

For the reasons stated above, Rimmer's Petition for a Writ of Certiorari should be denied.

DATED this 5th day of November, 1993.

Respectfully submitted,

JOHN D. FRENCH
Counsel of Record
MICHAEL L. CHEEVER
FAEGRE & BENSON
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 336-3802

THOMAS J. MOORE
CHARLOTTE C. WIESSNER
ADRIENNE O. MCNAMARA
FAEGRE & BENSON
2500 Republic Plaza
370 – 17th Street
Denver, Colorado 80202
(303) 592-5900

Attorneys for Respondent Octagon Gas Systems, Inc.

APPENDIX

STATUTES INVOLVED

This case involves the following provisions of the Oklahoma Statutes Annotated title 12A:

§ 1-201. General Definitions

Subject to additional definitions contained in the subsequent articles of the Uniform Commercial Code which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in the Uniform Commercial Code:

. . .

(37) (a) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods regardless of shipment or delivery to the buyer (Section 2-401 of this title) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9 of this title. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 of this title is not a "security interest", but a buyer may also acquire a "security interest" by complying with the provisions of Article 9 of this title. Unless a consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2-326 of this title).

(b) Whether a transaction creates a lease or security interest is determined by the facts of

each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

(i) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(c) A transaction does not create a security interest merely because it provides that:

(i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(ii) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance,

filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(iii) the lessee has an option to renew the lease or to become the owner of the goods,

(iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) For purposes of this subsection:

(i) additional consideration is not nominal if:

(A) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or

(B) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's

reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(ii) "reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(iii) "present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

. . .

§ 9-102. Policy and Subject Matter of Article

(1) Except as otherwise provided in Section 9-104 on excluded transactions, this article applies:

. . .

(b) to any sale of accounts or chattel paper.

. . .

§ 9-106. Definitions: "Account"; "General Intangibles"

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

"General intangibles" means any personal property, including things in action, other than goods, accounts, chattel paper, documents, instruments and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

§ 9-301. Persons Who Take Priority Over Unperfected Security Interests; Right of "Lien Creditor".

(1) Except as otherwise provided in subsection (2) of this section, an unperfected security interest is subordinate to the rights of:

. . .

(b) a person who becomes a lien creditor before the security interest is perfected;

. . .

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

§ 9-302. When Filing Is Required to Perfect Security Interest – Security Interests to Which Filing Provisions of This Article Do Not Apply

(1) A financing statement must be filed to perfect all security interests except the following:

. . .

(e) An assignment of accounts which does not transfer, alone or in conjunction

with other assignments to the same assignee, a significant part of the outstanding accounts of the assignor; or

. . .